BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Docket No. 98-121
BellSouth Telecommunications, Inc., and	)	
BellSouth Long Distance, Inc.	)	
Pursuant to Section 271 of the	)	
Communications Act of 1934, as	)	
amended, To Provide In-Region	)	
InterLATA Services to Louisiana	)	

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

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Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby petitions the Commission to deny the above-captioned application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (together, "BellSouth").

INTRODUCTION AND SUMMARY

Like its two prior applications to this Commission under Section 271, BellSouth's application for Section 271 authority in Louisiana should be denied for its chronic and widespread failure to meet the requirements of the statute. BellSouth has once again filed a blatantly deficient application, and its failures to comply with the statute and Commission Orders do not get better by dint of repetition. BellSouth's strategy can only be understood as a political one.

From one perspective, BellSouth's approach indeed confirms the wisdom of the Section 271 process. BOCs will not cooperate until and unless they understand that such cooperation is required as a *sine qua non* of interLATA entry. BellSouth has in fact made some progress in some areas identified by the Commission -- but not nearly enough. In considering this application,

the FCC must reaffirm to BellSouth and all BOCs the agency's firm commitment to the requirements and policies of Section 271.

BellSouth's application also confirms the difficulty and complexity of the process of prying open the local telephone markets, even assuming good faith by the monopolist. Witness after witness for BellSouth explains in detail the numerous problems experienced by market participants, as well as the ways in which BellSouth responded. While ostensibly an effort to disclaim any blame or intent to do competitive harm, the BellSouth pleading misses the point. Section 271 failures are not *mens rea* offenses; the checklist items are either being provisioned in a commercially useful manner or not. The record is unambiguous that at this time, good faith or not, BellSouth is not meeting the statutory standard.

The most appropriate response to BellSouth's application is a simple denial based on the fact that Louisiana is in the "ramp up" period. BellSouth is incorrect that PCS providers qualify as "competing providers of telephone exchange service" under Track A, since the PCS services offered today are complementary to and not a substitute for the wireline service offered by BellSouth. The wireline carriers that have requested access and interconnection from BellSouth in Louisiana are not yet receiving their full interconnection rights so that they are able to provide on a facilities-basis competing services to both business and residential consumers. Since no carrier has yet begun to provide predominantly facilities-based service, the requirements of Track A have not been met. The Commission should therefore deny this application for the same reasons it denied the Oklahoma application.

To the extent that it feels the need to review BellSouth's checklist compliance, the Commission will find the instant application not materially different than the flawed South

Carolina filing and the first Louisiana filing. The FCC's conclusions there that BellSouth's regionwide operational support systems ("OSS") fail to meet the requirements of the Act apply again here. BellSouth has simply not done enough to improve the situation and bring its OSS within the terms of the statute.

In addition to OSS problems, the checklist failings are legion. Resale restrictions, impediments to UNE combinations, output restrictions for trunks, and other (unfortunately by now) standard devices have been deployed.

This pattern of evasion and resistance is repeated in the Section 272 context, where BellSouth presents a board of directors for its long distance affiliate comprised of one lone person. Finally, this application clearly fails to clear the public interest hurdle. In no sense has the local market been irreversibly opened to competition. Entry in Louisiana is promising but at this point sparse. BellSouth's strained reading of the public interest provision notwithstanding, this is the central inquiry required of the Commission under Section 271(d)(3)(C). Moreover, there is no need to take seriously BellSouth's now fully refuted position that BOC long distance entry would somehow encourage local competition. The real reason for the lack of local competition in Louisiana is rather BellSouth's refusal to cooperate in opening its local market. It unfortunately appears that the Commission will be forced to reject quite a few of these applications before this strategy will be reconsidered.

I. BELLSOUTH HAS NOT MET THE REQUIREMENTS OF TRACK A.

Contrary to BellSouth's assertions, this application, like the prior Louisiana application, does not satisfy the requirements of Track A.[1] BellSouth has received qualifying requests from

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[1] Unlike the prior application, BellSouth here does not attempt to argue that it may proceed under Track B.

companies for interconnection agreements that, when fully implemented, will result in the provision of the kind of service described in Section 271(c)(1)(A). However, none of these agreements has been fully implemented, nor has any aggregate of agreements been implemented, such that interconnection has produced predominantly facilities-based competitive provisioning for both business and residential customers. Lacking a true commercial alternative,[2] Louisiana markets thus remain in the "ramp-up" period that Congress contemplated in Track A.[3] Track A remains unsatisfied in light of the *de minimis* amount of local facilities-based competition which exists in Louisiana. This inadequacy cannot be whitewashed by BellSouth's contrivance to equate mobile services offered by PCS providers with local exchange services. BellSouth's application remains premature.

A. BellSouth Has Received Several Qualifying Requests.

BellSouth has received several interconnection requests that, when implemented, will result in the provision of the kind of competing service described in Section 271(c)(1)(A). BellSouth has itself provided evidence that numerous facilities-based CLECs have partially entered or are preparing to enter local markets in Louisiana. BellSouth has identified five carriers, each of which provides facilities-based business service, and one carrier, which provides facilities-

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2 SBC Comm. Inc. v. FCC, 138 F.3d 410 at 420-21 (D.C. Cir. 1998) (upholding FCC's interpretation of "competing providers" as requiring an actual commercial alternative to the RBOC's local telephone exchange service).

3 Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, *Memorandum Opinion and Order*, 12 FCC Rcd 8685, at ¶¶ 43-46 (1997) (Congress recognized "that there would be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements") ("Oklahoma Order").

based business service as well as service to "a small number of residential lines."[4] In addition, there are numerous other prospective business and residential facilities-based carriers that have requested access and interconnection.[5]

Accordingly, Track B is unavailable, and BellSouth does not dispute this proposition.[6] BellSouth thus has the burden of demonstrating that it is in fact successfully interconnecting and exchanging traffic with facilities-based competitors. It has not met this burden.

B. BellSouth Cannot Demonstrate That Any Carrier Has Emerged From The "Ramp-up" Period And Thereby Satisfied Track A.

As a legal matter, Section 271 exhibits Congress' explicit preference for facilities-based entry.[7] Though the Commission has concluded that it need not "require any specified level of geographic penetration by a competing provider" with respect to Track A,[8] the Commission has appropriately ruled that "there must be an actual commercial alternative to the BOC in order to satisfy Section 271(c)(1)(A)."[9] Because of the requirement that the interconnecting CLECs

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4 BellSouth Br. at 6; see Wright Aff. at ¶ 66 ("[L]ess than 10 of these facilities-based lines appear to provide wireline local exchange service to residential customers.")

5 See Wright Aff. at ¶¶ 148-150.

6 Nor does BellSouth allege that any CLEC has negotiated in bad faith or has failed to abide by its implementation schedule, to the extent they are bound by one pursuant to an interconnection agreement.

7 See Oklahoma Order at ¶¶ 41-43.

8 See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, *Memorandum Opinion and Order,* 12 FCC Rcd 20543, at ¶ 76 (1997) (citation omitted) ("Michigan Order"). This nonetheless remains a crucial factor under the public interest requirement of section 271.

9 Oklahoma Order at ¶ 14 (citation omitted).

provide service, at a minimum, "predominantly over its own facilities," a BOC must show that CLECs provide viable competitive alternatives on a facilities-basis.

In order to ensure that full competition has been enabled in the local exchange markets, where carriers are not wholly or largely reliant on the networks of their competitors, both business and residential customers must enjoy the benefits from the 1996 Act in the form of facilities-based competition. A *de minimis* level of facilities-based competition for either class of customer will not satisfy the "competing provider" standard of Section 271(c)(1)(A).

On the basis of this record, the Commission must conclude that facilities-based competition as required by Track A is not present in Louisiana. First, the FCC should determine that the requirement for "facilities-based" competition in Section 271(c)(1)(A) applies independently to both classes of customers identified in the statute -- business and residential -- as a matter of law.[10] Alternatively, the FCC can defer resolution of this legal question and decide that the sum total of facilities-based local competition for both classes of customers taken together is inadequate to meet the "predominantly" requirement of Track A.

In order to qualify as a Track A competing provider, a CLEC must serve a majority of its business customers and a majority of its residential customers with its "own facilities." This requirement flows as a matter of law and policy. First, the term "predominantly" should be given its common meaning, that is, "having ascendancy, influence, or authority over others; superior;

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10 It remains unclear how each Commissioner intends to resolve this issue when confronted with a 271 application. See, e.g., Letter from William E. Kennard, Chairman, FCC, to Sam Brownback, United States Senator at 2 (Apr. 22, 1998) (on file with FCC) ("I favor applying the statute to any specific set of facts in a practical and common sense manner that is informed by the overall goal of section 271, as well as by the formal record developed pursuant to that application.")

dominating; controlling."[11] At a minimum, this means more than 50%, as measured, e.g., by investment.[12] This construction explicates the statutory term as a quantitative measure, and it necessarily applies to the "own facilities" deemed to be included within the section.[13]

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11 Webster's New Twentieth Century Dictionary Unabridged (1979).

12 The FCC has consistently interpreted the term "predominantly" to mean more than 50%. See e.g., Complaint of WNYC Communications Group Against Time Warner City Cable Group Request for Carriage, 8 FCC Rcd. 3925, at ¶ 4 (1993); Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 2965, ¶¶ 4, 5 (1993). Many federal courts of appeals have adopted similar definitions. See Price v. Denison Indep. Sch. Dist., 694 F.2d 334, 361 n.54 (5th Cir. 1982)(the term predominantly "implies . . . enrollment 'substantially' over 50 percent"); Bing Crosby Productions, Inc. v. United States, 588 F.2d 1293, 1299 (9th Cir. 1979)("As long as the property was located within the United States for fifty percent of the year, then its predominant use is considered to be within the United States."); Katharine Gibbs Sch., Inc. v. FTC, 612 F.2d 658, 668 (2d Cir. 1979) (using "predominantly" to refer to a majority). Congress can be attributed with knowledge and acceptance of the FCC's and the courts' traditional construction of the term and thus these precedents should be followed in the case of Section 271. See Florida Nat'l Guard v. Federal Labor Relations Auth., 699 F.2d 1082, 1087 (11th Cir.)("Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning. Congressional silence in the Act indicates acceptance of the prior practice."), cert. denied, 464 U.S. 1007 (1983).

13 Sprint also believes that the Commission has mistakenly failed to give full meaning to the term "predominantly" as a qualitative measure. In allowing UNEs to qualify as a CLEC's "own facilities" the FCC has ignored the competitive significance of the interconnector's own network facilities. Independent back-office operations, for example, are important, but they do not by any means represent the undoing of the bottleneck which the Bell Operating Companies enjoy.

Local loops represent the most competitively significant plant. Local loop investment is by far the most financially significant investment, simply as a matter of dollars expended. But it also means true sunk costs, and thus a real commitment by a competitor to market entry and growth. The loop also represents the most significant source of the incumbent LEC's bottleneck control. The term "predominantly," then, should also be understood to include independently owned local loop facilities.

This test is required by the statute. It is important to keep in mind that the language of the statute requires that the competing providers offer local service "exclusively" or "predominantly" over their own telephone exchange service facilities. 47 U.S.C. § 271(c)(1)(A) (emphasis added). Indeed, the legislative history is clear that the "predominantly" requirement was actually a Congressional alternative to supplement its "exclusively" requirement. Congress offered this fallback out of a pragmatic recognition that some competitive activity short of an entirely separate independent local exchange network might still satisfy the policy objectives of Section 271(c)(1)(A). For example, the Conference Committee Report states as follows:

> This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.[14]

As this statement demonstrates, Congress allowed a carrier providing services "predominantly" over its own independent facilities to qualify under Section 271(c)(1)(A) solely because it thought it unlikely that there would be any facilities-based competitors which relied "exclusively" on their own facilities when they initially entered the market. The import is that a carrier qualifying as facilities-based would, under any circumstances, have substantial independent facilities.

In order to give full force to the statute and its goals, the facilities-based requirement must also be construed to apply separately to residential and business classes of customers. The subsection specifically sets forth both classes of customer as the intended beneficiaries of local competition. It is not sufficient for a BOC to point to a CLEC with its own business loops but

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14 S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 148 ("Conference Report").

only resold residential loops. To assert otherwise, as BellSouth does, is to assert that Congress wanted business customers to have a real competitive choice but didn't care to promote meaningful alternatives for residential consumers.

Moreover, Congress' discussion of the prospects of local competition shows its intent that facilities-based carriers serve residential customers as well as businesses. The Conference Report discusses at length the "meaningful facilities-based competition" made possible by the fact that "cable services are available to more than 95 percent of United States homes."[15] As the Conference Report concludes, "[s]ome of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."[16]

The facts in Louisiana show that BellSouth's application fails under both requirements. The number of residential customers who are being served by a CLEC over its own facilities is virtually non-existent. KMC serves less than 10 residential lines over its own facilities.[17] No other carrier provides residential service over its own facilities.[18] This number represents less than .0007% of the residential access lines in Louisiana.[19] Significantly, these lines appear to be priced

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15 S. Conf. Rep. at 148 (emphasis added).

16 Id. (emphasis added). The Commission itself has repeatedly recognized the distinct submarket for residential (and Low volume business) users, on the one hand, and business users on the other. See, e.g., Teleport Communications Group Inc. and AT&T Corp., CC Dkt. No. 98-24, *Memorandum Opinion and Order* (rel. July 23, 1998).

17 Wright's public affidavit states that less than 10 residential lines are served on a facilities-basis, and that KMC Telecom is the only wireline carrier serving residential customers on a facilities-basis. See Wright Aff. at ¶¶ 66, 88.

18 See Wright aff. at ¶¶ 66-123.

19 See FCC Statistics of Communications Common Carriers, (rel. Dec. 5, 1997).

at business line rates, that is, they are likely not intended to be competitive with BST's residential rates.[20] As such, there is no facilities-based competitive alternative for residential service in Louisiana.

In the Michigan Order, the Commission opined that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'"[21] The same construction was upheld by the Court of Appeals.[22] In light of the *de minimis* number of residential lines being provisioned by CLECs over their "own facilities," Track A cannot be satisfied.

Even if one ignores residential customers as BellSouth would have the Commission do, an examination of the number of facilities-based CLEC lines for both business and residential customers combined still yields the conclusion that the application is deficient. The CLEC customers are not being served predominantly by independent facilities. In a state with approximately 2.25 million access lines, only 4,282 are provided by facilities-based CLECs over their own facilities across several localities.[23] Even when all six competitors cited by BellSouth

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20 See KMC Telecom Inc., Regulations and Schedules of Intrastate Charges Applying to End-User Telecommunications Services Within the State of Louisiana at § 5.2 (effective Jan. 9, 1998) (establishing $31.00 basic local exchange service flat recurring rate); Wright Aff. at ¶ 90 ("KMC's local exchange service tariff does not distinguish between residential and business basic local exchange service offerings but are priced to compete with BST's tariffed business local exchange line services."); www.bellsouth.com (advertising BellSouth residential rates of $10.97-12.64 in Louisiana.)

21 Michigan Order at ¶ 77 (citation omitted).

22 SBC Communications v. FCC, No. 97-1425, slip op. (D.C. Cir. Mar. 20, 1998).

23 See Wright Aff. at ¶ 32.

are considered in the aggregate, one cannot say that an "actual commercial alternative" is being offered to any type of customer by competitors "predominantly" over independent facilities. While hardly impressive in absolute terms, the number of resold lines by these carriers reflects significantly more economic activity (about 12,000 lines, throughout various local areas in the state).

BellSouth argues that enforcing the "predominance" requirement somehow penalizes it for facilitating resale. But the statute's requirement for competition that is predominantly facilities-based is unambiguous; the language cannot simply be read out of the statute.[24] Nor is the language hardly some indecipherable or ambiguous accident; it reflects a deliberate policy choice by Congress to promote competitive alternatives independent of the monopoly stronghold of the Bell Companies. At least one of these competitors, Congress has dictated, must be at a sufficiently developed level of entry such that it provides service predominantly over its own facilities.[25] BellSouth would not here be 'penalized' for the amount of resale; rather, the Commission would be acting on the immaturity of facilities-based competition.

Moreover, the presence of substantially greater resale activity in BellSouth territory is hardly accidental or outside of BellSouth's control. BellSouth has publicly articulated its interconnection strategy and explained unabashedly that it is less hostile to resale than to other

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24 See Sutherland Stat. Const. § 46.06 ("effect must be given, if possible, to every word, clause and sentence of a statute").

25 As the Commission has itself observed, resale is an expected form of quick, initial entry, allowing marketing and accretion of market experience while undertaking the longer process of constructing and deploying independent facilities. Thus, the statutory qualifier "predominantly" comprehends the successful completion of the evolution from resale to competitive facilities. This evolution is readily observable in the history of long distance competitive entry, for example.

methods of entry. In this way, BellSouth has expressly sought to discourage the construction and deployment of competitive facilities: "The more the [CLEC] customers are doing business with us, the less willing they are to build their own network . . . ."[26] And another BellSouth employee has explained: "By helping other carriers better compete, we will keep them as customers and ensure they won't bypass our network."[27]

Until BellSouth accommodates interconnection with true commercial alternatives that offer predominantly facilities-based service, Track A cannot be deemed satisfied. The limited state of facilities-based competition in Louisiana disqualifies this application. Track A has not been satisfied and Louisiana remains in the "ramp-up" period.

C. The PCS Providers Cited By BellSouth Are Offering Mobile Services That Do Not Satisfy Track A.

Implicitly conceding the deficiency of local exchange competition, BellSouth tries to once again wedge itself into Track A compliance by pointing to the emergence of PCS services in New Orleans and Baton Rouge. BellSouth's offer of proof shows no more than what the FCC and industry observers have repeatedly described: PCS has the potential, under certain conditions, to become a viable, competitive alternative to fixed, wireline service in the future. In response to the first Louisiana application, Sprint provided a lengthy set of submissions demonstrating the significant gap between the hoped-for potential of PCS and today's reality. See BellSouth-Louisiana at ¶ 73 ("an applicant must demonstrate that a PCS provider . . . offers service that both satisfies the statutory definition of 'telephone exchange service' in Section 3(47)(A) and competes

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26 Communications Daily, July 2, 1998 at 3 (quoting Thomas Moquin, Director, Marketing and Communications for BellSouth Interconnection Services).

27 Id. (quoting Scott Schaefer, President - BellSouth Interconnection Services).

with the telephone exchange service offered by the applicant in the relevant state"). Today, PCS offers a highly competitive alternative to cellular and EMRS services. The future potential of PCS to offer a viable choice to local telephony has not yet been actualized or proven.

1. The Commission Has Repeatedly Found that PCS Does Not Now Compete with Landline Telephone Service.

By directive of Congress, the Commission conducts annual studies on the "competitive market conditions" facing PCS and other CMRS.[28] For each year after the 1996 Act, the FCC has reported to Congress on its continuing efforts to "gauge the extent to which wireless services are a complement to or a substitute for wireline service."[29] In each year, the Commission has observed the potential for PCS and wireless services to compete with wireline services, but has also concluded each time that this potential has yet to be realized.[30]

For example, the 1997 Report found,

> The services offered by the few operating broadband PCS carriers are currently priced closer to cellular service than to comparable wireline services and therefore it is too early to state that broadband PCS providers' offerings might be perceived as a wireline substitute.[31]

This conclusion was confirmed in this year's annual report:

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28 47 U.S.C. § 332 (c)(1)(C).

29 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Second Report*, 12 FCC Rcd 11266, at 11323 (1997) ("1997 CMRS Competition Report").

30 Id. at 11325 (emphasis added).

31 Most significantly, the Commission has noted that CMRS competition for wireline business will depend upon CMRS pricing and access to the ILEC networks. This includes both cost-based pricing and number portability. As explained in subsection B, infra, these barriers hold firm today.

> While many analysts concur that a transfer of usage between wireline and wireless systems will occur, it is hard to say exactly how long it will take or how much substitution will occur. One key variable is the sensitivities of consumer demand to the relative prices of wireless and wireline telephone service as the difference in price narrows. However, it is difficult to make accurate predictions because there is no relevant behavioral history from which we can draw guidance.[32]

Whatever aspirations the Commission has for PCS's future potential, it is plain that its current policies are being driven by today's economic reality of distinct wireless and wireline markets. For example, just last month the FCC opted to forbear from certain regulatory requirements (but not others) as applied to PCS companies in response to a request by the PCIA. In its analysis, the Commission chose to forbear or to continue regulation based on the implicit premise that PCS companies compete against cellular companies and other wireless technologies but are not constrained in their economic performance by wireline telephone companies.[33]

The Commission applied this learning in considering the Bell Atlantic-NYNEX merger. The Commission there carefully considered the market for fixed local telephone services and actual and potential market participants in evaluating the competitive effects of the merger. It specifically rejected arguments that CMRS -- cellular, PCS or SMRS -- should be included within that market:

> Mobile telephone service providers are currently positioned to offer products that largely complement, rather than substitute for, wireline local exchange. These providers utilize spectrum whose carrying capacity is relatively finite. There are economic and technical limits to increasing spectrum reuse through reduction in cell size and use of compression and encoding techniques. Additionally, their installed technology and facilities are specialized for use in mobile

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32 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, FCC 98-91 at 66 (rel. June 11, 1998) ("1998 CMRS Competition Report").

33 See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance, FCC 98-134, *Memorandum Opinion and Order and Notice of Proposed Rulemaking* (rel. July 2, 1998).

> communications. These factors limit the ability of wireless carriers to compete on a mass-market scale with wireline providers in the local exchange and exchange access services markets. Although the Applicants predict that some of these providers will become competitors to wireline providers, the Applicants recognize that . . . such competition is currently precluded as a practical matter by the higher prices that mobile telephone service providers can charge. . . . Accordingly, we are unpersuaded . . . that mobile telephone service providers are, at this time, either singularly or as a class, significant market participants; they lack the requisite incentives and access to facilities that would allow them to compete effectively in the relevant market.[34]

Only last year, the Commission again observed,

> We have . . . considered information available on consumers' inclinations to switch between mobile phone services and other individual communications services (particularly potential substitutes like payphones, pagers, private wireline services, etc.) in response to price changes or other competitive signals. Consumers appear to perceive these various services to be distinct, and the Commission has previously recognized that mobile services can be distinguished on the basis of functional differences.[35]

The Commission further noted that, as it had already determined in recent proceedings, "mobile communications services are largely complementary to wireline services," noting that wireless services providers may offer substitutes for wireline services in the future.[36]

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34 Bell-Atlantic-NYNEX, 12 FCC Rcd 11985, at ¶ 90 (1997) (attached at App. A). The Order also noted that "fixed wireless may ultimately become a viable (and in some markets, a formidable) substitute for wireline service, but whether that occurs depends upon spectrum availability, technological issues, and future events." Id. at ¶ 91.

35 Pittencrieff Communications Inc. and Nextel Communications, Inc. For Consent to Transfer Control of Pittencrieff Communications, Inc. and its Subsidiaries, *Memorandum Opinion and Order*, 13 FCC Rcd 8935, at ¶ 27 (1997).

36 Id. at n.59.

These consistent conclusions are well-founded in economic analysis. From both supply and demand perspectives, there is no basis for finding otherwise. Under a traditional relevant market analysis, mobile wireless services do not and cannot now compete with wireline services.[37]

2. The Commission's Findings Are Fully Substantiated.

Applying the traditional Brown Shoe[38] criteria, CMRS and wireline service each have distinct, particular uses and characteristics. CMRS plainly offers the advantage of mobility; landline services offer ubiquity and reliability. It is telling that PCS and cellular companies advertise their signal quality relative to one another, not to landline service. This fact is shown in Appendix A, a collection of CMRS advertisements local to the New Orleans, Baton Rouge and Shreveport areas. For example, Sprint PCS's ad campaign centers on the key phrase "the clear alternative to cellular."[39] A recent advertisement by PrimeCo featured the phrase "This 4th of July, Celebrate Our Nation's Independence from Cellular."[40]

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37 The Commission has utilized relevant market analysis to evaluate specific transactions, see, e.g., Teleport Communications Group Inc. and AT&T Corp., CC Dkt. No. 98-24 (rel. July 23, 1998); Bell Atlantic-NYNEX, supra; Application of General Electric Comp. GE Subsidiary, Inc. 21, and MCI Communications Corp. for Authority to Transfer Control of RCA Global Communications, Inc., 4 FCC Rcd 8207 (1989), as well as for purposes of assessing market power and the degree of regulatory oversight thus needed to compensate for market failures. See, e.g., Decreased Regulation of Certain Basic Telecommunications Services, *Notice of Proposed Rulemaking*, 2 FCC Rcd 645 (1987); Common Carrier Services, 95 FCC 2d 554 (1983).

38 Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

39 Appendix A contains recent newspaper advertisements by PCS and cellular companies in Louisiana.

40 See App. A. Other RBOCs have in fact insisted that "the wireline and wireless businesses are very different." See Affidavit of Stan Sigman, President and CEO, SBC Wireless Inc., at ¶ 11 submitted in Application of SBC Communications Inc. and Ameritech Corp. to Transfer Control of Licenses (filed July 24, 1998).

Both the public and industry also recognize PCS and POTS as distinct markets. For example, recent consumer press reports[41] and industry analyses[42] analyze CMRS wholly separate and apart from local telephone services. From a supply side, some suppliers overlap, but the technologies are fundamentally different. Critically, the installed technology and facilities of CMRS providers are specialized for mobile use. The capacity of the spectrum used is limited relative to the switched landline network, even with reductions in cell size and the use of digital compression.[43]

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41 See "A Consumer's Guide to the Changing World of Cellular Telephones," TRAC (Oct. 1997) (comparing service qualities of the various wireless technologies without discussion of landline services); "Who Needs A Cell Phone?" Consumer Reports, Vol. 62, No.2 (Feb. 1997)(to same effect); "Cell Phones. Test and Report," Consumer Reports, Vol. 62, No. 11 (Nov. 1997).

42 See, e.g., "Wireless State of the Union" Yankee Group (Sept. 1997) (analyzing wireless competition only); "Competition in the Wireless Market," Peter D. Hart Research Associates (Feb. 1997) published at <http:// www.wow-com.com/professional/reference/hart/hart.cfm>; "PCS v. Cellular: A Quarterly Survey of Wireless Pricing in Markets Where PCS Operators Have Begun Service," Robinson-Humphrey Company (Oct. 8, 1997)(studying price competition between services without mention of wireline service). Wall Street analysts generally note the possible future of CMRS companies to compete with fixed services, but place that possibility many years into the future. See "Intercel, Inc.- Company Report," Robinson-Humphrey Company (May 13, 1997)(concluding that PCS competition with landline is five to seven years away, and describing PCS' market potential mainly as alternative second line); Pacific Bell-Company report, Duff & Phelps (July 2, 1997) (describing PCS as "more of a threat as an attractive part of a competing carrier's service bundle than a vehicle to siphon traffic off PB's local network"); Credit Suisse First Boston Corp., "Wireless telecommunications Services (Apr. 23, 1998) (describing wireless business and predicting some wireline replacement in the future). Many financial analysts continue to study and report on wireless services alone without any speculation as to future competition with wireline services. See, e.g., "Wireless Telecommunications Services - Industry Report," Deutsche Morgan Grenfell Inc. (Feb. 4, 1998); "Wireless Signals - Industry Report," Alex Brown (Nov. 24, 1997); "Wireless Update," NatWest Securities Corp. (Oct. 1, 1997).

43 See 1997 CMRS Competition Report, supra n.29.

Most significantly, the prices for PCS (and other CMRS) preclude their use as an effective landline substitute. Wireline telephone rates in Louisiana provide for an unlimited number of minutes for local service. In contrast, PCS providers offer service packages with flat fees (which may include a set number of minutes) plus additional usage charges. Note that the per minute charges apply for all incoming calls after the first minute as well. This rate structure also means that only low volume users will find the pricing at all comparable.[44] But even then, the rates still remain substantially higher for CMRS under almost every scenario.[45] Moreover, even if service charges were at all competitive, the disparate costs of handsets would dissuade consumers from viewing the services as direct substitutes. While some vendors offer "disposable" handsets for wireline service, the cost of PCS phones are substantially more, and rise dramatically for dual-mode phones. Most significantly, there is absolutely no indication that the introduction of PCS has had any effect on the pricing trends for local telephone service.

BellSouth's reliance on the study by the National Economic Research Associates ("NERA") comparing prices for residential wireline and PCS in New Orleans is unconvincing. As

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44 BellSouth tries to make the point that AT&T's PCS plans offering single rate plans for local and long distance calls without separate roaming fees are somehow demonstrating competition with landline service. In fact, when AT&T announced this plan, it explicitly stated that it was doing so to target Sprint's PCS business -- not wireline service. See "AT&T Wireless Joins Sprint-PCS in Single-rate Offer," Communications Daily at 4 (May 8, 1998). Further, to the extent these single rate plans take traffic off landline networks, they do so for exchange access -- since it is the long distance rate that is being priced attractively. Exchange access is of course not relevant to Section 271's search for competition to the BOC. Finally, even with single rate plans, such as Sprint PCS' "Toll-Free USA," the wireless usage charge applies to each minute of long distance calling as well. See <<www.sprintpcs.com/cgi-bin/pricing>>.

45 See Shapiro and Hayes Dec. at 13-23 (App. B).

Professor Carl Shapiro and Dr. John Hayes explain in the attached Declaration, the NERA study merely demonstrates that:

> While PCS undoubtedly offers benefits that wireline service cannot offer, most notably mobility, until it can offer basic local exchange service at prices comparable to those offered by the BOC, it will not be a meaningful economic alternative to wireline service . . . . [U]ntil they offer a genuine economic alternative to wireline service, PCS providers will not erode BellSouth's local monopoly in Louisiana.[46]

As Shapiro and Hayes conclude:

> PCS is far more expensive than BellSouth wireline service for the vast majority of residential customers in Louisiana. PCS is less expensive than BellSouth wireline service in New Orleans only for customers making fewer than 116 minutes of local calls or 170 minutes of outgoing toll calls per month and who would nonetheless purchase five vertical features. Given that the average consumer in New Orleans uses over 2000 minutes of local and intraLATA calling each month and spends at least 94 minutes on the phone on local calls for every one she spends on an intraLATA call, and given that few very-low-use customers are likely to purchase a package of five vertical features, the calling and purchasing patterns underlying the NERA study are surely very rare. . . . Contrary to the NERA conclusions, the data on calling patterns and pricing plans show clearly that PCS in Louisiana is less expensive than BellSouth's wireline services only for a very, very small portion of customers under very circumscribed conditions.[47]

The failure of PCS as currently provided to serve as an "actual commercial alternative" is also evident in the limited nature of the BellSouth PCS interconnection agreements in the record. The PCS interconnection agreements in Louisiana are expressly designed to allow for the provision of mobile service -- not for fixed services. For example, the BellSouth-PrimeCo agreement recites as its purpose: "The access and interconnection obligations contained herein

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46 Shapiro and Hayes Dec. at 13-14.

47 Shapiro and Hayes Dec. at 22 (emphasis in original).

enable [PrimeCo] to provide CMRS service in those areas where it is authorized to provide such service. . . ."[48]

Further, the PCS agreements do not address number portability. Although the Commission has repeatedly stated that number portability implementation will be crucial to wireless services' ability to compete with wireline services,[49] the implementation of permanent wireless number portability may not occur for several more years. See Petition for Forbearance of the Cellular Telecommunications Industry Association, CC Dkt. No. 96-116 (filed Dec. 16, 1997) (requesting FCC delay wireless number portability at least until PCS carriers complete their 5-year build-out schedules).[50] PCS providers have themselves explained to the Commission that the regulatory framework must allow them first to compete in the wireless market; the expense of developing wireless number portability, they argue, will hinder PCS as a viable commercial substitute for cellular and other wireless services and thus is not in the public interest. Comments of PrimeCo in CC Docket 96-116 (filed Feb 23, 1998). In other words, PCS providers view themselves as competing with other wireless carriers. It is unsurprising, then, that PCS and other wireless phone numbers information are not available in the way landline numbers are, i.e., directory listings.

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48 BellSouth-PrimeCo Personal Communications, L.P. Interconnection Agreement at II; see BellSouth-Sprint Spectrum, L.P. Interconnection Agreement at II; BellSouth-MERETEL COMMUNICATIONS L.P. at II.

49 See, e.g., Telephone Number Portability, *Third Report and Order*, 12 Comm. Reg. 1 (P&F), at ¶ 18 (1998).

50 In the Matter of Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, at ¶ 169 (1996), first recon., 12 FCC Rcd 7236, at ¶ 134 (1997) (finding that special technical challenges prevent ready implementation of wireless number portability).

Yet another significant barrier to wireless-wireline competition rests in the absence of "calling party pays" for wireless services. The Commission has commenced a proceeding to address this fundamental issue. See *Calling Party Pays Service Option in the Commercial Mobile Radio Services*, 12 FCC Rcd 17693 (1997). The principal trade association for the wireless industry, CTIA, has itself explained to the Commission that

> the absence of CPP is a handicap to the competitive status of the wireless industry. So long as wireless subscribers are compelled to pay for incoming calls, wireless services will not be an adequate substitute for wireline services.[51]

This barrier will not be resolved quickly. An industry study has explained in detail the impediments to implementing "CPP" including legal, technical and commercial. CPP has been made available in select areas in the U.S. by some ILECs on a voluntary basis, although state regulators have expressed some reluctance to allow its implementation for fear of customer confusion. Even where CPP is voluntarily offered in some areas of the country, it does not apply to calls from other telephone companies' networks, other wireless networks, interexchange carrier networks and certain other types of calls. Significantly, it is not offered in the BellSouth service areas -- a decision made by BellSouth.[52]

BellSouth submits a study sponsored by Mr. William C. Denk to try to defeat these realities by purporting to show the fixed uses of PCS.[53] As Shapiro and Hayes observe, "the chief

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51 Comments of CTIA, p.4, filed in WT Docket No. 97-207 (filed May 8, 1998). See also, Bensche-Marks, Vol. 98-08 Lehman Brothers Equity Research, July 27, 1998 (discussing importance of CPP because it will prompt consumers to begin to view their wireless phone as a substitute for wireline service).

52 See CTIA, "The Who, What and Why of 'Calling Party Pays'" (July 4, 1997). Additional barriers are posed for PCS, such as the inability at this time to offer E911 services.

53 See BellSouth Br. at 12-15.